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No. 87-1201

IN THE

Supreme Court of the United States

October Term, 1988

MYLES OSTERNECK, GUY-KENNETH OSTERNECK and MYLES OSTERNECK and GUY-KENNETH OSTERNECK as TRUSTEES for the BENEFIT of ROBERT OSTERNECK,
Plaintiffs-Petitioners,

v.

ERNST & WHINNEY,
Defendant-Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT

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QUESTION PRESENTED

Is a post-judgment motion filed within the ten days prescribed by Fed. R. Civ. P. 59(e), and which seeks to change the original judgment by adding discretionary prejudgment interest to the amount of plaintiffs' recovery on federal securities claims, a motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e)?

LIST OF PARTIES

The parties to the proceedings below were the Petitioners Myles Osterneck, Guy-Kenneth Osterneck, and Myles Osterneck and Guy-Kenneth Osterneck as Trustees for the Benefit of Robert Osterneck (Plaintiffs-Appellants); E. T. Barwick Industries, Inc., M. E. Kellar, B. A. Talley (Defendants-Cross Appellants); Eugene Barwick (Defendant-Appellee); and Respondent Ernst & Whinney (Defendant-Appellee).

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ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT

Respondent Ernst & Whinney respectfully requests that this Court affirm the Eleventh Circuit's opinion dismissing Petitioners' appeal for lack of jurisdiction.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported as *Osterneck v. E.T. Barwick Industries, Inc.*, 825 F.2d 1521 (11th Cir. 1987), and is set forth in the Joint Appendix at 49.

The original judgment in the district court is set forth in the Joint Appendix at 6.

The order of the district court amending the original judgment to award prejudgment interest is set forth in the Joint Appendix at 39.

The Amended Judgment is set forth in the Joint Appendix at 44.

JURISDICTIONAL STATEMENT

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). The judgment of the Court of Appeals of the Eleventh Circuit was entered on August 31, 1987. The Eleventh Circuit denied Petitioners' Suggestion of Rehearing In Banc and Petition for Rehearing on October 19, 1987. The Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit was filed with this Court on January 15, 1988 and granted on June 6, 1988.

FEDERAL STATUTES AND RULES INVOLVED

28 U.S.C § 1291:

Final Decisions of District Courts.

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, . . . except where a direct review may be had in the Supreme Court. . . .

Rule 59(e) of the Federal Rules of Civil Procedure:

Motion to Alter or Amend a Judgment.

A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

Rule 4(a) of the Federal Rules of Appellate Procedure:

(a) Appeals in Civil Cases.

(1) In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; . . . .

. . . .

(4) If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii)

under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing.

STATEMENT OF THE CASE

This securities fraud case arose out of the September 8, 1969 merger of Cavalier Bag Company ("Cavalier"), a corporation owned by Petitioners, into E.T. Barwick Industries, Inc. ("Barwick Industries"). Pursuant to the merger, Petitioners exchanged their stock in Cavalier for stock in Barwick Industries. In agreeing to the exchange, Petitioners allegedly relied on Barwick Industries' audited financial statements for the two years preceding the merger. Respondent Ernst & Whinney, the independent certified public accountants for Barwick Industries, audited those financial statements.

Nearly six years after the merger, on September 4, 1975, Petitioners filed this action alleging violations of Sections 10(b) and 20 of the Securities Exchange Act of 1934 (15 U.S.C. §§ 78j(b), 78t), Rule 10b-5 thereunder (17 C.F.R. § 240.10b-5), and the common law of Georgia. The original complaint and the amended complaint each sought prejudgment interest as part of the recovery. (R1-1-44-45 & R7-147-44-46)

Following almost ten years of pretrial proceedings, this case went to trial in October, 1984, against Barwick Industries; E. T. Barwick, B. A. Talley and M. E. Kellar, who were directors and officers of Barwick Industries prior to or during the merger; and Ernst & Whinney. After a three and one-half month jury trial, a verdict was returned in favor of Ernst & Whinney and E. T. Barwick, individually. However, the jury found in favor of Petitioners against defendants Barwick Industries, Talley and Kellar in an amount exceeding $2.6 million as compensatory damages for their violations of federal securities laws and Georgia common law.

The original judgment was entered on January 30, 1985. (J.A. 6) The same day, the district court told the parties that "if prejudgment interest is granted it will be — the judgment can be amended." (J.A. 5) Within the ten days prescribed by Fed. R. Civ. P. 59(e), Petitioners filed their motion for prejudgment interest computed from September 8, 1969, the date of the merger. (J.A. 8) While that motion was pending, Petitioners filed a notice of appeal and two notices of cross-appeal from the January 30, 1985 Judgment. (J.A. 34)

On July 1, 1985, the district court granted Petitioners' motion and, precisely as it had indicated, ordered that the original judgment be "AMENDED" to award prejudgment interest to Petitioners. (J.A. 39) On July 9, 1985, the Court entered the "Amended Judgment," increasing by nearly $1 million the compensatory damages awarded Petitioners on their federal securities claims. (J.A. 44)

Petitioners failed to appeal from the Amended Judgment as to Respondent Ernst & Whinney. The Eleventh Circuit held that Petitioners' motion for prejudgment interest was a Rule 59(e) motion to alter or amend the original judgment, and that Petitioners' notices of appeal filed while the Rule 59(e) motion was pending had no effect. *Osterneck*, 825 F.2d at 1526; *see* Fed. R. App. P. 4(a)(4). Accordingly, the Eleventh Circuit dismissed Petitioners' appeal as to Respondent Ernst & Whinney for lack of jurisdiction.

SUMMARY OF ARGUMENT

Petitioners' post-judgment motion to add discretionary prejudgment interest to the amount of their recovery on federal securities claims constituted a motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e). Petitioners' motion was filed within the ten days set forth in Rule 59(e), and sought to "alter or amend the judgment" by increasing the compensatory damages awarded.

In addition to the literal language of Rule 59(e), important principles of finality require treatment of Petitioners' motion within Rule 59(e). "Finality" under 28 U.S.C. § 1291 ordinarily requires that all of the district court's decisions in a case be reviewed together in a single appeal. Rule 59(e) and Fed. R. App. P. 4(a)(4) help implement this requirement. Appellate Rule (4)(a)(4) precludes appeal until the district court has resolved a timely Rule 59(e) motion. Therefore, characterizing a post-judgment motion as within Rule 59(e) means that its resolution will be reviewed on appeal with the rest of the case. Conversely, characterizing a particular post-judgment motion as outside Rule 59(e) and the other Rules listed in Appellate Rule 4(a)(4) means that the order resolving the motion may be reviewed separately from the rest of the case. Because the district court's decision whether to award prejudgment interest fixed the amount of compensatory damages for Petitioners' claims on the merits, it needed to be reviewed with the rest of the case and is properly within Rule 59(e).

Except where required by necessity or justified by long tradition, this Court has refused to deviate from the requirement of a single appeal from all issues in the case. Orders which conclusively determine important

issues completely separate from the merits and which would be effectively unreviewable on appeal from the final judgment are accorded separate review under the "collateral order" doctrine. Costs are divorced from the judgment by the express language of Rule 58 that "[e]ntry of the judgment shall not be delayed for the taxing of costs." Orders which deal with issues historically treated as "costs" are separately reviewable under this Court's decisions in *White v. New Hampshire Department of Employment Security*, 455 U.S. 445 (1982) (attorney's fees); *Budinich v. Becton Dickinson & Co.*, 108 S. Ct. 1717 (1988) (attorney's fees); and *Buchanan v. Stanships, Inc.*, 108 S. Ct. 1130 (1988) (costs). Like the "collateral order" doctrine, these decisions require the order to be completely separate from the merits of the action and require strong, affirmative policy reasons to justify separate appellate review.

None of the exceptions to the requirement of a single appeal from all decisions in a case authorizes appeal from a judgment awarding compensatory damages where a request for further compensatory relief in the form of prejudgment interest is pending. Such orders are not "completely separate" from the merits of the action. They have not been addressed historically as costs, and separate suits solely for the recovery of prejudgment interest have not been recognized. Orders awarding or denying discretionary prejudgment interest are not "effectively unreviewable" on appeal from final judgment. There are no affirmative policy reasons justifying appellate review of such orders separate from the remainder of the action. Motions for the award of discretionary prejudgment interest should continue to be treated within Rule 59(e), presented within its ten-day period, and resolved in the district court before appellate review begins.

Finally, the "unique circumstances" asserted by Petitioners do not require reversal. Petitioners did not forego filing a notice of appeal due to the district court's express assurance that an untimely filing was "timely." Thus, Petitioners fail to come within the strictly limited holding in *Thompson v. Immigration & Naturalization Service*, 375 U.S. 384 (1964).

ARGUMENT

I.

A MOTION MADE WITHIN THE TEN DAYS PRESCRIBED BY RULE 59(e), AND WHICH SEEKS TO ADD DISCRETIONARY PREJUDGMENT INTEREST TO THE COMPENSATORY DAMAGES AWARDED BY A JUDGMENT ON FEDERAL SECURITIES CLAIMS, IS A RULE 59(e) MOTION TO ALTER OR AMEND THE JUDGMENT.

The Eleventh Circuit correctly held that a post-judgment motion filed within the ten days prescribed by Rule 59(e), seeking to add discretionary prejudgment interest to the amount awarded by a judgment on federal securities claims, is a Rule 59(e) motion to alter or amend the judgment. Accordingly, under Fed. R. App. P. 4(a)(4) Petitioners' notices of appeal filed prior to the resolution of their motion had no effect. The decision of the Eleventh Circuit dismissing the appeal against Ernst & Whinney for lack of jurisdiction should be affirmed.

A. Petitioners' Motion for Prejudgment Interest Was A Motion To Alter Or Amend Within The Literal Language Of Rule 59(e).

Petitioners' request for a prejudgment interest award altering the amount of compensatory damages to which they were entitled under the initial judgment, on the understanding that if the request were granted the judgment would be "amended," is literally a "motion to alter or amend the judgment" within the express

language of Rule 59(e). The initial judgment adjudicated Petitioners' federal securities claims and fixed their entitlement to compensatory damages; the amended judgment revised that determination of the parties' rights by allowing recovery of further compensatory damages in the form of prejudgment interest. Petitioners' motion sought a "substantive alteration" of the rights adjudicated by the merits judgment (*Osterneck*, 825 F.2d at 1526), required the district court to "substantively reconsider" the judgment (*id.* at 1525), and necessarily falls within Rule 59(e).

In deeming Petitioners' motion "precisely the sort of alteration or amendment contemplated by Rule 59(e)" (*id.* at 1525), the Eleventh Circuit aligned itself with the overwhelming weight of authority applying that Rule to motions for discretionary prejudgment interest. *See, e.g., McConnell v. MEBA Medical & Benefits Plan*, 778 F.2d 521, 526 (9th Cir. 1985); *Elias v. Ford Motor Co.*, 734 F.2d 463, 466 (1st Cir. 1984); *Stern v. Shouldice*, 706 F.2d 742, 747 (6th Cir.). *cert. denied*, 464 U.S. 993 (1983); *Goodman v. Heublein, Inc.*, 682 F.2d 44, 45-46, (2d Cir. 1982); *Lee v. Joseph E. Seagram & Sons, Inc.*, 592 F.2d 39, 42 (2d Cir. 1979); *Hoffman v. Celebrezze*, 405 F.2d 833, 835-37 (8th Cir. 1969); *Spurgeon v. Delta S.S. Lines, Inc.*, 387 F. 2d 358, 359 (2d Cir. 1967); *Gray v. Dukedom Bank*, 216 F.2d 108, 109-10 (6th Cir. 1954). *But see Jenkins v. Whittaker Corp.*, 785 F.2d 720 (9th Cir.), *cert. denied*, 107 S. Ct. 324 (1986) (discussed *infra* pp. 28-29).

B. Important Principles of Finality Require Application of Rule 59(e) to Petitioners' Motion for Prejudgment Interest.

1. Federal Rule of Civil Procedure 59(e) And Federal Rule of Appellate Procedure 4(a)(4) Work Together to Implement the Finality Requirement of Section 1291 of the Judicial Code.

Section 1291 of the Judicial Code (28 U.S.C. § 1291) confers appellate jurisdiction upon the courts of appeals only from "final decisions" of the district courts. "A 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Budinich v. Becton Dickinson & Co.*, 108 S. Ct. 1717, 1720 (1988) (*quoting Catlin v. United States*, 324 U.S. 229, 233 (1945)). *Accord Berman v. United States*, 302 U.S. 211, 212-13 (1937).

This Court has recognized the central importance of the finality requirement to effective judicial administration:

> Finality as a condition of review is an historic characteristic of federal appellate procedure. It was written into the first Judiciary Act and has been departed from only when observance of it would practically defeat the right to any review at all. Since the right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice, Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration.

Cobbledick v. United States, 309 U.S. 323, 324-25 (1940) (footnote omitted). " '[T]he final judgment rule is the dominant rule in federal appellate practice.' " *Flanagan v. United States*, 465 U.S. 259, 270 (1984) (citation omitted).

Finality ordinarily requires not only that the district court decide all issues completely, but also that its decisions be reviewed *together* in the context of a single appeal. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949) ("The purpose [of 28 U.S.C. § 1291] is to combine in one review all stages of the proceeding that effectively may be reviewed and corrected if and when final judgment results."); *Cinerama, Inc. v. Sweet Music, S.A.*, 482 F.2d 66, 70 (2d Cir. 1973) (Friendly, J.) ("The final judgment rule is designed not merely to prevent an appeal on an *issue* concerning which the trial court has not yet made up its mind beyond possibility of change but also to eliminate the need for separate appellate consideration of different elements of a single claim.") (emphasis in original).

Federal Rule of Civil Procedure 59(e) and Federal Rule of Appellate Procedure 4(a)(4) help to implement the final judgment rule and its policy of securing complete decisions for unified appellate review. Rule 59(e) requires that motions to alter or amend a judgment be filed within ten days, the same time limitation found in Rule 50(b) (motion for judgment notwithstanding the verdict), Rule 52(b) (motion to amend findings) and Rule 59(b) (motion for new trial). These Rules ensure that all requests to the trial court for further decisions affecting a judgment are made promptly after entry of the judgment.

Under Appellate Rule 4(a)(4), where "any party" files any of the foregoing motions (including those under Rule 59) the time for appeal by "all parties" runs from entry of the order resolving the motion; a "new notice of

appeal must be filed from entry of the order;" and any previously-filed notice of appeal has "no effect." Fed. R. App. P. 4(a)(4). Where it applies, Rule 4(a)(4) nullifies a premature notice of appeal as if it had never been filed and the appellate court lacks jurisdiction to hear the case. *Griggs v. Provident Consumer Dist. Co.*, 459 U.S. 56, 59 (1982) (*citing* Fed. R. App. P. (4)(a)(4) advisory committee note to 1979 Amendment). By precluding appellate jurisdiction until the district court completely resolves all issues affecting the judgment, Appellate Rule 4(a)(4) and Civil Rule 59(e) help implement the final judgment rule and secure simultaneous review of decisions that may be reviewed together.

2. Petitioners' Motion For Prejudgment Interest Needed to Be Resolved in the District Court Before Appellate Review Began.

Because of the interplay of Rule 59(e) and Appellate Rule 4(a)(4), a decision that a particular motion is or is not within Rule 59(e) carries with it important finality consequences. To characterize a motion as within Rule 59(e) implies that the order resolving it should be reviewed together with the rest of the case. Conversely, to deem a post-judgment motion outside the careful framework of Rules 50(b), 52, and 59 means that, notwithstanding the combined review normally required by the final judgment rule, separate appellate review is permitted. *See* Green, *From Here to Attorney's Fees: Certainty, Efficiency, and Fairness in the Journey to the Appellate Courts,* 69 Cornell L. Rev. 207, 221-23 (1984). Thus, although couched in Rule 59(e) terms, the real question presented here is whether a judgment determining plaintiffs' compensatory damages (the January 30 judgment) can be appealed separately from

an adjudication of a request for additional compensatory relief on the very same claim in the form of prejudgment interest (the July 9 judgment). The final judgment rule requires a negative answer.

Until Petitioners' motion for prejudgment interest was decided, the litigation on the merits was not over and the judgment was not yet ripe for execution. The district court had not resolved fully all of the elements of the compensatory damages recoverable by the Petitioners on their securities claims, nor had it finally established the amount of that recovery. To allow appeal of a judgment before a plaintiff's entitlement to discretionary prejudgment interest is resolved by the district court would contravene the requirement of Section 1291 to effect simultaneous review of complete decisions governing all elements of a plaintiff's claim on the merits. Thus, the traditional treatment of post-judgment requests for discretionary prejudgment interest as within 59(e), and not independently appealable, is consistent with the unitary appeal requirement of the final judgment rule.

C. Petitioners' Request For Prejudgment Interest Does Not Fall Within The Narrow Exceptions To The Unified Review Required By Section 1291.

In an attempt to breathe life into their premature notices of appeal, Petitioners distort the requirements of finality. They urge that their motion for prejudgment interest was actually an "independent proceeding" (Petitioners' Brief at 28), separate from the judgment establishing other elements of compensation for the very same claim and warranting a separate appeal. Contrary to Petitioners' contention, such a view of "finality" is neither traditional nor practical.

Narrow exceptions to the requirement of a single appeal exist only where decisions are completely separate from the merits and necessity or long tradition mandate separate appellate review. A judgment on the merits while a motion for prejudgment interest is pending possesses none of these characteristics. No exception to Section 1291's requirement of unified appellate review justifies Petitioners' attempt to sever different components of compensatory damages on the very same claim.

1. This Court's Decisions Concerning Collateral Orders and Costs Fail To Support A Departure From Finality Principles In This Case.

Petitioners cite the "collateral order" doctrine developed in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) as support for deviating in this case from the requirement of a single appeal from a final judgment. In *Cohen,* however, the Court underscored the importance of unitary appellate review:

> Nor does [28 U.S.C. § 1291] permit appeals, even from fully consummated decisions, where they are but steps towards final judgment in which they will merge. The purpose [of 28 U.S.C. § 1291] is to combine in one review all stages of the proceeding that effectively may be reviewed and corrected if and when final judgment results. But this order of the District Court did not make any step toward final disposition of the merits of the case and will not be merged in final judgment. When that time comes, it will be too late effectively to review the present order and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably. We conclude that the matters embraced in the decision appealed from are not of such an interlocutory nature as to affect, or to be affected by, decision of the merits of this case.
>
> This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. The Court has long given this provision of the statute this practical rather than a technical construction.

Id. at 546-47.

Thus, *Cohen* requires that (1) an order be completely separate and independent from the merits; and (2) strong, affirmative reasons mandate separate appellate review. Indeed, subsequent cases confirm that the "collateral order" doctrine allows departure from combined review of all decisions of the district court only

when the order appealed from "conclusively determine[s] the disputed question, resolve[s] an important issue completely separate from the merits of the action and [is] effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). *Accord Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 108 S. Ct. 1133, 1137 (1988).[1]

The Court has declined to "transform the limited exception carved out in *Cohen* into a license for broad disregard of the finality rule imposed by Congress in § 1291." *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 430 (1985) (*quoting Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 378 (1981)). To the contrary, it repeatedly has interpreted Section 1291 to require one appeal of issues that may be reviewed together. *See Van Cauwenberghe v. Biard*, 108 S. Ct. 1945, 1952 (1988) ("[a]llowing appeals of interlocutory orders that involve considerations enmeshed in the merits of the dispute would waste judicial resources by requiring repetitive appellate review of substantive questions in the case"); *Stringfellow v. Concerned Neighbors In Action*, 107 S. Ct. 1177, 1183 (1987) (order granting permissive intervention but denying intervention as of right is not

[1] The Court strictly construes the "completely separate from the merits" requirement of *Cohen*. That requirement is not satisfied where resolving the asserted "collateral issue" requires assessment of evidence presented at trial. *Van Cauwenberghe v. Biard*, 108 S. Ct. 1945, 1952-53 (1988) (forum non conveniens decision not sufficiently separate or collateral for application of *Cohen* doctrine); *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 430 (1985) (disqualification of counsel in a civil case not sufficiently separate or collateral for application of *Cohen* doctrine); *Flanagan v. United States*, 465 U.S. 259, 264-65 (1984) (disqualification of counsel in a criminal case not sufficiently separate or collateral for application of *Cohen* doctrine).

immediately appealable because, as a party, intervenor can obtain effective review of its claims on appeal from final judgment); *DiBella v. United States*, 369 U.S. 121, 129 (1962) (rejecting interlocutory appellate consideration of preindictment suppression of evidence as authorizing "truncated presentation of the issue of admissibility"); *Parr v. United States*, 351 U.S. 513, 519 (1956) ("[t]he lack of an appeal now will not deny effective review of a claim fairly severable from the context of a larger litigious process") (citation omitted).

In *White v. New Hampshire Department of Employment Security*, 455 U.S. 445 (1982), this Court effectively imported *Cohen's* limited "collateral and independent" order analysis into the construction of Rule 59(e). *Id.* at 452 n.14. The Court found that a request by a "prevailing party" for attorney's fees under 42 U.S.C. § 1988 raised legal issues "collateral to" the main cause of action and that their award was "uniquely separable" from it. *Id.* at 451-52. Accordingly, the Court held that the request was not a "motion to alter or amend" subject to the ten-day time limit of Rule 59(e).

More recently, in *Budinich v. Becton Dickinson & Co.*, 108 S. Ct. 1717 (1988), this Court confirmed the finality consequences of its decision in *White*. The Court held that a judgment was final and appealable despite a pending request for attorney's fees. It emphasized the traditional treatment of attorney's fees as an element of costs:

> [A] claim for attorney's fees is not part of the merits of the action to which the fees pertain. Such an award does not remedy the injury giving rise to the action, and indeed is often available to the party defending against the action. At common law, attorney's fees were regarded as an element of "costs" awarded to the prevailing party (*see* 10 C. Wright,

> A. Miller & M. Kane, Federal Practice and Procedure: Civil § 2665 (1983)), which are not generally treated as part of the merits judgment, *cf.* Fed. Rule Civ. Proc. 54(d) ("[e]ntry of the judgment shall not be delayed for the taxing of costs"). . . .

Id. at 1721. *Accord Buchanan v. Stanships, Inc.*, 108 S. Ct. 1130 (1988) (prevailing party's Rule 54(d) motion for costs not within Rule 59(e)).

In both *White* and *Budinich*, the Court stressed the traditional and functional independence of attorney's fee requests from the judgment on the merits. *White*, 455 U.S. at 451-52; *Budinich*, 108 S. Ct. at 1720-22. The Court cited precedents establishing that the issue of attorney's fees is so independent of the main action as to support a separate federal action " 'solely to obtain an award of attorney's fees' " for legal work done in prior proceedings. *White*, 455 U.S. at 451 n.13 (*quoting New York Gas Light Club, Inc. v. Carey*, 447 U.S. 54, 66 (1980)); *Budinich*, 108 S. Ct. at 1720 (*citing White* and *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161 (1939) (noting fee application would support an independent lawsuit)).

Furthermore, consistent with *Cohen* and the Court's other finality decisions, the Court in *White* and *Budinich* also identified affirmative policy reasons unique to attorney's fee awards that justified their traditional treatment separately from the judgment on the merits. *White*, 455 U.S. at 453; *Budinich*, 108 S. Ct. at 1722. To have held otherwise actually would have encouraged piecemeal appellate review of fee requests; litigants who obtained interim but arguably final injunctive orders in the course of protracted civil rights litigation would have been forced to file successive requests for attorney's fees during the proceeding, lest

they be held untimely under Rule 59(e)'s ten-day time period. Moreover, the ten-day limit of Rule 59(e) threatened to deprive counsel of time necessary to negotiate private settlements of fee questions. *White*, 455 U.S. at 452-53. The Court also mentioned, but disclaimed reliance on, potential conflicts of interest associated with deferral of merits issues pending resolution by counsel of entitlement to their own fees. *White*, at 453 n.15. The *Budinich* Court recognized that these same factors were present irrespective of the source of the request for attorney's fees. *Budinich*, 108 S. Ct. at 1722.

In *Budinich*, the Court concluded that the finality of a judgment despite a pending request for attorney's fees rested upon the *general* treatment of attorney's fees as a traditional part of costs independent of the merits; and not upon the conceptual "merits" or "non-merits" character of a *particular* fee award in a particular case:

> [W]hat is of importance here is not preservation of conceptual consistency in the status of a particular fee authorization as "merits" or "non-merits," but rather preservation of operational consistency and predictability in the overall application of § 1291. This requires, we think, a uniform rule that an unresolved issue of attorney's fees for the litigation in question does not prevent judgment on the merits from being final . . . .
>
> . . . The time of appealability, having jurisdictional consequences, should above all be clear. We are not inclined to adopt a disposition that requires the merits or non-merits status of each attorney's fee provision to be clearly established before the time to appeal can be clearly known. Courts and litigants are best served by the bright-line rule, which accords with traditional understanding,

> that a decision on the merits is a "final decision" for purposes of § 1291 whether or not there remains for adjudication a request for attorney's fees attributable to the case.

Budinich, 108 S. Ct. at 1721-22. *Accord Van Cauwenberghe v. Biard*, 108 S. Ct. 1945, 1951 (1988) ("In fashioning a rule of appealability under § 1291, however, we look to categories of cases not to particular injustices.") (*citing Carroll v. United States*, 354 U.S. 394, 405 (1957); *United States v. MacDonald*, 435 U.S. 850, 856-58 n.6 (1978)).

2. Petitioners Fail to Justify Excluding Prejudgment Interest From Traditional Finality Analysis.

Nothing in the Court's attorney's fee/costs decisions or the "collateral order" doctrine supports the contention that an award of prejudgment interest on federal securities claims is independent of the judgment on the merits, or that such a judgment ought to be final and appealable where that aspect of plaintiff's compensatory damages remains to be determined. Requests for prejudgment interest remain an integral part of plaintiff's judgment on the merits and may not be likened to attorney's fee awards or other "collateral" orders.

Unlike attorney's fees or costs, the award of prejudgment interest is not "uniquely separable" from the decision on the merits. A plaintiff's recovery of prejudgment interest depends upon an assessment of the adequacy of plaintiff's compensation in light of facts presented at trial; it is not the "inquiry separate from the decision on the merits" associated with granting a "prevailing party" its costs or attorney's fees. *Cf. White*, 455 U.S. at

451-52. Prejudgment interest traditionally has never been deemed the proper subject of an independent action or proceeding or an element of a prevailing party's costs. Prejudgment interest is not available to whichever party prevails, but is recoverable only by a plaintiff, and only as an element of compensatory damages arising from the plaintiff's claims on the merits.[2]

In *Cinerama, Inc. v. Sweet Music, S.A.*, 482 F.2d 66 (2d Cir. 1973), the Second Circuit squarely held that a judgment ostensibly entered under Rule 54(b) that imposed liability and awarded compensatory damages was not appealable where the amount of prejudgment interest remained to be determined. It refused to allow the district court to "sever" for appellate purposes a bank's claim for principal from its claim for prejudgment interest:

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[2] The Eleventh Circuit expressly recognized that the discretionary prejudgment interest awarded here constituted "compensation which directly stems from the injury giving rise to the action." (J.A. 57) (*quoting Norte & Co. v. Huffines*, 416 F.2d 1189, 1191 (2d Cir. 1969), *cert. denied*, 397 U.S. 989 (1970)). The district court also noted that in federal securities cases "prejudgment interest is a part of compensatory damages" to be "'tempered by an assessment of the equities'." Those "equities" are determined by factors inseparable from the merits, including the degree of personal wrongdoing on the part of the defendant and whether the award of prejudgment interest would in fact be compensatory. (J.A. 10) (citation omitted). *See, e.g., Wolf v. Frank*, 477 F.2d 467, 479 (5th Cir.), *cert. denied*, 414 U.S. 975 (1973); *City Nat'l Bank v. American Commonwealth Fin. Corp.* 608 F. Supp. 941, 943 (W.D.N.C. 1985) *aff'd*, 801 F.2d 714 (4th Cir. 1986), *cert. denied*, 107 S. Ct. 1301 (1987). Petitioners themselves urged that an award of discretionary prejudgment interest "would in fact be compensatory" and was "the only way" to make them whole. (J.A. 15-17, 21-23)

Since the same operative facts that created the right to recover principal gave rise to the right to recover interest, there was but a single claim, as would be evident if the Bank had counterclaimed only for principal and, after obtaining judgment, had endeavored to sue for prejudgment interest. *See* A.L.I., Restatement of Judgments 2d, § 61 (Tent. Draft No. 1, March, 1973). We held long ago that a district court could not endow with finality a judgment which determined the merits of all of the contentions asserted by the parties but had not yet fixed the damages sought by the prevailing ones, even though the computation would now seem to be comparatively simple, if not ministerial in nature. We see no significant distinction when the court has determined part of the damages, here the principal, but has reserved, as raising fact issues, the amount of prejudgment interest.

Id. at 69 (citations omitted) (quotation omitted). Judge Friendly's opinion for the Second Circuit in *Cinerama* presaged this Court's decisions in *White* and *Budinich*. It expressly distinguished the finality analysis traditionally accorded prejudgment interest from that potentially applicable to a pending request for attorney's fees. It stressed the collateral and independent nature of fee awards, and their dependence upon facts separate from the transaction or occurrence involved in the main claim. *Id.* at 70 n.2. The Second Circuit also found that deferring a decision on attorney's fees until after final determination of the merits on appeal afforded a better perspective for evaluating the skill and effort of counsel and the benefits thereby conferred. *Id.*

This distinction in treatment between prejudgment interest and attorney's fees was reiterated in *Garcia v. Burlington Northern R.R.*, 818 F.2d 713 (10th Cir. 1987). After noting that its decision in *Budinich*[3] required treating all attorney's fees requests as "collateral," the Tenth Circuit held:

> In contrast, prejudgment interest, if permissible, must be a part of the primary damage relief sought. Any evidence relating to prejudgment interest is available when the other issues are tried, and thus, there is no reason to delay a decision on prejudgment interest until after the merits of a case are decided. If plaintiff is entitled to any prejudgment interest, it must be as a portion of his damages.

Id. at 721.

In sum, in contrast to the traditional, analytical, and evidentiary independence from the merits of a prevailing party's request for attorney's fees, requests for prejudgment interest are inextricably bound up with the merits of the plaintiff's claims. Because prejudgment interest is an element of plaintiff's compensatory damages, an order revising a prior judgment to include prejudgment interest necessarily "implies a change" in the prior judgment. *Osterneck*, 825 F.2d at 1526. Under such circumstances, a request for prejudgment interest is squarely within Rule 59(e), and the "collateral order" analysis of attorney's fee awards employed in *White* and

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[3] *Budinich v. Becton Dickinson & Co.*, 807 F.2d 155 (10th Cir. 1986), *aff'd*, 108 S. Ct. 1717 (1988).

Budinich is wholly inapplicable.[4]

Even if requests for prejudgment interest could be viewed somehow as completely separate from the merits, Petitioners fail to present any affirmative reason why such requests *should* be divorced for purposes of appeal from other elements of compensatory relief. They do not contend that deferring final judgment to allow simultaneous review of all decisions affecting a plaintiff's compensatory relief on the merits erodes any important rights or renders any issue "effectively unreviewable." *Gulfstream*, 108 S. Ct. at 1137. Nor do they point to any practical need for separate review of such requests or any long tradition supporting such treatment. Under such circumstances, there is no basis for permitting appeal of discretionary prejudgment interest awards apart from the rest of the case.

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[4] Petitioners also contend, without supporting authority or explanation, that the January 30, 1985 judgment "would qualify as final under Rule 54(b) . . . ." Petitioners' Brief at 28. However, that Rule requires that the district court make an express determination that "there is no just cause for delay." *Curtiss-Wright Corp. v. General Elec. Co.*, 446 U.S. 1, 7-10 (1980); *DiBella v. United States*, 369 U.S. 121, 126 (1962); *Cullen v. Margiotta*, 811 F.2d 698 (2d Cir.), *cert. denied*, 107 S. Ct. 3266 (1987); *In re Yarn Processing Patent Validity Litig.*, 680 F.2d 1338 (11th Cir. 1982) (district court *must* enter certification for Rule 54(b) to be applicable). Here, Petitioners did not request such a certification (or even mention Rule 54(b) in the trial court), and the district judge did not make the express finding. Moreover, existing Rule 54(b) decisions contradict the notion that Rule 54(b) could allow separate appellate treatment of various elements of damages arising from the same claim. *Liberty Mutual Ins. Co. v. Wetzel*, 424 U.S. 737, 742 (1976); *International Controls Corp. v. Vesco*, 535 F.2d 742 (2d Cir. 1976), *cert. denied*, 434 U.S. 1014 (1978); *Cinerama, Inc. v. Sweet Music, S.A.*, 482 F.2d 66, 69 (2d Cir. 1973).

Accordingly, the Court should not disturb the traditional and settled treatment of such motions within Rule 59(e).[5]

D. Petitioners' Proposed "Finality" Test Ignores Traditional Finality Principles And Would Eviscerate Predictable And Consistent Application Of Section 1291.

Unable to satisfy the requirements of Section 1291, Petitioners instead announce their own principle of "finality," label it "traditional," and ask this Court to embrace it. They urge that any pending motion that does not "seek to change any rights which had been

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[5] The "finality" cases cited at pp. 14 - 15 of Petitioners' Brief support neither the broad principles for which they are cited nor the result Petitioners seek. Three dealt with finality of appellate court decisions under provisions different from Section 1291. *FTC v. Minneapolis-Honeywell Reg. Co.*, 344 U.S. 206 (1952); *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120 (1945); *Department of Banking v. Pink*, 317 U.S. 264 (1942). Two involved appeals expressly certified for separate review under Fed. R. Civ. P. 54(b). *In re Flight Trans. Corp. Sec.*, 825 F.2d 1249, 1251 (8th Cir. 1987), *cert. denied*, 108 S. Ct. 1113 (1988); *Exchange Nat'l Bank v. Daniels*, 763 F.2d 286 (7th Cir. 1985). Another was expressly limited to its facts and would now fall within the provisions of Fed. R. Civ. P. 54(b). *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 512 (1950). Two cases involved issues which, in the absence of immediate review, would have been unreviewable for a number of years. *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964); *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962). Finally, *Mitchell v. Forsyth*, 472 U.S. 511 (1985), involved the "collateral order" doctrine distinguished above. Not one of Petitioners' "finality" cases supports the contention that a judgment awarding compensatory relief on a claim should be appealable before the district court determines a request for prejudgment interest on the very same claim.

established by the judgment" does not suspend its finality. Petitioners' Brief at 17. Application of this proposed test would not change the result here. The amended judgment changed the rights established by the initial judgment by awarding nearly $1 million in additional compensatory damages. Hence, Petitioners fail their own proposed test. *See supra* pp. 10-11.

In any event, Petitioners' proposed test clashes with this Court's interpretation of Section 1291. Their test would render independently appealable any interim decision by a district court that would not be affected by further proceedings. For example, partial summary judgment establishing liability alone could qualify as final and appealable; a subsequent award of damages would be deemed "collateral" as entailing no change in the rights established by the judgment on liability and granting only what was due "because of" it. Such piecemeal approaches to "finality" are, of course, prohibited by 28 U.S.C. § 1291. *Liberty Mutual Ins. Co. v. Wetzel*, 424 U.S. 737, 744 (1976) (judgment establishing liability that did not also determine entitlement to damages or other relief held not "final") ("where assessment damages or awarding of other relief remains to be resolved [such judgments] have never been considered to be 'final' within the meaning of 28 U.S.C. § 1291"); *Taylor v. Board of Educ.*, 288 F.2d 600, 602 (2d Cir. 1961) ("An order adjudging liability but leaving the quantum of relief still to be determined has been a classic example of non-finality from the time of Chief Justice Marshall to our own.") (citations omitted).

Contrary to Petitioners' contention and the decision in *Jenkins v. Whittaker Corp.*, 785 F.2d 720 (9th Cir.), *cert. denied*, 107 S. Ct. 324 (1986), this Court's observation in *White* that the attorney's fee request before it sought what was due "because of" the judgment has no

talismanic significance. The Civil Rights Statute in *White* awarded attorney's fees only to a "prevailing party." 42 U.S.C. § 1988. The fee award was due "because of" the judgment only in the sense that the judgment satisfied the statutory prerequisite by identifying the "prevailing party." A "prevailing party" is entitled to an award of costs "because of" the judgment in the same way. *Buchanan v. Stanships, Inc.*, 108 S. Ct. 1130 (1988). Nothing in *White* or *Buchanan* supports using a "because of" test outside the "prevailing party" context to differentiate among elements of compensatory relief in the main proceeding on the merits. A plaintiff does not need to establish that it has previously "prevailed" to recover prejudgment interest; a plaintiff recovers prejudgment interest, if at all, in the course of "prevailing."

Petitioners attempt to confine their proposed test only to orders "effectively terminating the litigation." Petitioners' Brief at 23-24. That does not improve it, but only makes it circular. As this Court recently noted, to make finality turn upon whether an order is "an order ending litigation" is "ultimately question-begging . . . ." *Budinich*, 108 S. Ct. at 1720-21.

Petitioners' proposed test is flawed because it would permit piecemeal appeals without addressing whether necessity or tradition require separate review. By allowing separate appeals from rulings on different elements of compensatory relief on the very same claim, Petitioners' test fails to secure a single appeal of what effectively may be reviewed together. This so-called "finality" test would create results inconsistent with traditional principles of finality and destroy "operational consistency and predictability in the overall application of § 1291." *Budinich*, 108 S. Ct. at 1721.

To characterize a post-judgment motion seeking re-

lief on the merits as outside Rule 59(e) based solely upon whether the trial court has previously considered it would also upset the careful framework of specific post-judgment provisions of the Federal Rules of Civil Procedure. Once judgment is entered, the ten-day time limit of Rule 59(e) requires prompt filing of any further requests for relief affecting the judgment. Motions seeking to alter the compensatory relief already awarded by a judgment should not be placed outside Rule 59(e). That would remove the ten-day limit and render the parties uncertain as to when a judgment already entered could be treated as fully resolved by the district court. Such results conflict with cases recognizing that post-judgment motions for further relief on claims resolved by a judgment are within Rule 59(e) and untimely unless raised within its ten-day period. *See, e.g., McConnell v. MEBA Medical & Benefits Plan*, 778 F.2d 521 (9th Cir. 1985) (motion seeking prejudgment interest at rate greater than that provided by amended judgment, and motion seeking punitive damages, both of which were filed nearly one year after entry of amended judgment, held within Rule 59(e) and thus untimely).

Particularly substantial and unnecessary burdens would accompany a decision that pending prejudgment interest motions are outside Rule 59(e) and separately appealable from supposedly "final" judgments not addressing such compensatory relief. The merits-oriented factors pervading awards of prejudgment interest require review of such issues together with the appeal on the merits. *See supra* note 2. If Petitioners' argument were accepted, consolidation of appeals would be necessary simply to put together what had been taken apart needlessly. Without Rule 59(e)'s ten-day time limit, there would be no assurance that all issues affecting the

plaintiff's compensation on the merits would be raised promptly in the district court or that consolidated appeals could proceed in a timely or efficient manner. In the meantime, simultaneous jurisdiction in the district court and court of appeals over different aspects of compensatory damages on the same claim would contravene a key purpose of Fed. R. App. P. 4(a)(4). *See supra* p.14.

This case presents a clear opportunity for this Court to ensure that Rule 59(e) and Appellate Rule 4(a)(4) are applied consistently to achieve prompt resolution and unified appeal of issues which should be decided together. The Court has already established that attorney's fees and other costs, divorced from the merits by tradition and by Rule 58, are outside Rule 59(e). Here, the Court can confirm placement of the opposite pole by holding that motions for relief traditionally encompassed within the merits remain within Rule 59(e).

In sum, requests for prejudgment interest require no appellate review separate from that afforded other elements of compensatory relief. They necessarily imply a change in any prior judgment fixing the compensation awarded to plaintiff on the merits. They are in no sense collateral to the merits, and are squarely within Rule 59(e). Accordingly, Petitioners' premature notices of appeal filed prior to entry of the amended judgment were ineffective under Fed. R. App. 4(a)(4), and the Eleventh Circuit properly dismissed the appeal as to Ernst & Whinney.

II.

THE UNIQUE EQUITABLE CIRCUMSTANCES PRESENTED IN *THOMPSON v. IMMIGRATION AND NATURALIZATION SERVICE* DO NOT REQUIRE REVERSAL.

Petitioners also urge that the "unique circumstances" of *Thompson v. Immigration & Naturalization Service*, 375 U.S. 384 (1964) require reversal. Neither the rule nor the rationale of *Thompson* is applicable, as the record below and Petitioners' own acts demonstrate.

In *Thompson*, a petitioner served a motion for new trial within ten days after receiving notice of entry of the judgment, but twelve days after the judgment was entered. The "trial court specifically declared that 'a motion for a new trial' was made 'in ample time.' " *Thompson*, 375 U.S. at 384. The petitioner relied upon the court's statement and did not appeal from the original judgment, but did timely appeal from denial of his motion for a new trial. Faced with these facts, this Court held that the appeal was timely. Under the "unique circumstances" exception, "an appellate court may and should hear an appeal even though it is not timely, if the appellant reasonably relied on an erroneous statement of the district court that the appeal . . . was timely, and the appeal would have been timely if the district court had been correct." *Marane, Inc. v. McDonald's Corp.*, 755 F.2d 106, 111 n.2 (7th Cir. 1985).

Petitioners repeatedly refer to district court "characterizations" of the January 30, 1985 judgment as final as allegedly having misled them as to the timeliness of their appeal. However, as Petitioners' themselves admit, "[i]t is well established . . . that an

inaccurate label does not determine the time for filing an appeal." Petitioners' Brief at 34. In any event, the references of the district court to the judgment as a "final" judgment are completely consistent with the result reached by the Eleventh Circuit Court of Appeals. Of necessity, a Rule 59(e) motion is made with respect to a "judgment" which, in many cases, would otherwise be "final." That is precisely why Appellate Rule 4(a)(4) was amended in 1979 to provide that the filing of a Rule 59(e) motion *suspends* the time for appeal. Fed. R. App. (4)(a)(4) advisory committee note to 1979 Amendment.

Petitioners' contention that the entry and docketing of the judgment pursuant to Fed. R. Civ. P. 58 & 79(a) "sent a clear signal to the parties that the judgment was to be considered final for purposes of appeal notwithstanding the prejudgment interest issue" ignores the plain language of those two rules. Rule 58(1) requires entry of the judgment on a general jury verdict, and Rule 79(a) requires entry of a judgment on the docket. The district court's compliance with these two Rules did not repeal Appellate Rule 4(a)(4). The only "clear signal" sent by these actions was that a general jury verdict had been returned.

The other "action" of the district court cited by Petitioners was the court's denial as untimely of E. T. Barwick's motion for extension of time to file a bill of costs and of Barwick Industries' request for stay of execution without giving bond. However, the time limits for requesting costs are set forth in Northern District of Georgia Local Rule 255-7, which provides that they must be filed within "30 days after the entry of judgment." No local rule suspends that time period where a post-judgment motion listed in Fed. R. App. P. 4(a)(4) is filed. Thus, treatment of Petitioners' motion as a Rule 59(e) motion suspending finality for appeal is

consistent with the decision that Barwick's motion for extension was untimely. Similarly, Petitioners fail to explain how a denial of a stay of execution without giving bond is affected by Fed. R. App. P. 4(a)(4).[6]

In any event, the record rebuts any assertion that Petitioners relied on any erroneous statement of the district court. Prior to the filing of Petitioners' motion for prejudgment interest, the district court expressly stated that the judgment would have to be "amended." The only vehicle provided by the Federal Rules of Civil Procedure for amending a judgment is Rule 59(e). Petitioners filed their motion within the ten days required by that Rule. The order awarding prejudgment interest was specifically termed an "amended judgment." *Osterneck*, 825 F.2d at 1528 & n.11.

In *Thompson*, the district court assured petitioner that an untimely motion was timely. Here, the district court directed Petitioners to file their motion within the proper time period, and Petitioners did so. Under these factual circumstances, the *Thompson* standard is not met.

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[6] Petitioners also contend that the *clerk* of the district court treated the judgment as final by charging an additional filing fee for the July, 1985 Notice of Cross-Appeal filed by Petitioners. None of the cases cited by Petitioners decided under *Thompson* turns upon whether a party is misled by a clerk who is in turn misled by that party's own error in captioning its Notice of Appeal as a "Cross-Appeal."

Petitioners conclude with a laundry list of actions by various other *parties* which are claimed to constitute "unique circumstances." Again, Petitioners fail to explain how these actions constitute the type of affirmative misrepresentations or misstatements *by the court* required in *Thompson*. No action by the parties was sufficient to confer jurisdiction upon the court of appeals in direct contravention of the Federal Rules of Appellate Procedure and of the subject matter jurisdiction established by the Congress of the United States.

CONCLUSION

For the foregoing reasons, the judgment of the Eleventh Circuit Court of Appeals should be affirmed.

Dated: Atlanta, Georgia
August 24, 1988

Respectfully submitted,

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